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No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., et al.,
and
LINEAS AEREAS DE NICARAGUA, S.A.,
Petitioners

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioners pray that this Court grant rehearing of its order of January 14, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the petition filed November 29, 1962, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The ten foreign airline petitioners seek equality of airport charges at the Miami International Airport with those of the principal United States international airlines. They rely on Article 15 of the Chicago Convention of 1944, a multi-lateral Convention:

> "any charges that may be imposed or permitted to be imposed by a contracting state for use of such [public] airports * * * by aircraft of any other contracting state *shall not be higher* * * * As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services."

Seven petitioners also rely on the more specific provisions in bilateral Air Transport Service Agreements not considered by the court of appeals.

Because the petition for certiorari laid no emphasis on what appeared to petitioners to be obvious, this petition for rehearing is filed principally to point out the importance of right decision in the matter.

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[1] 61 Stat. 1180, entered in force April 4, 1947. The Interim Agreement on International Civil Aviation 59 Stat. 1516, Department of State, Executive Agreement Series 469, was effective as to the United States June 6, 1945. Article VIII, section 9 contained virtually the same provisions as to airport charges as Article 15 of the Convention. The Big Four lease-contracts were not executed until December 1945 effective January 1, 1946.

I. THE EMASCULATION OF A VITAL PROVISION OF THIS WORLD-EMBRACING CONVENTION IS A MATTER OF GRAVE AND CONTINUING GENERAL IMPORTANCE TO THE UNITED STATES

The language of "national" treatment and the "no higher" phrase here involved has a history in United States agreements with other nations of at least 145 years. We have discovered no suggestion in that long history that exceptions may be lightly introduced by one party or that the plain objective may be defeated or evaded by introduction of theories of "classification". On the contrary, the history of development of the use of "national treatment" clauses shows that when the parties intend that there may be special treatment as to particular classes in the home State, the contracting States, including the United States, have been careful to plainly state that intention in the instrument.

Precedent for the language under scrutiny is found in the Convention of Commerce and Navigation with Great Britain, July 3, 1815, 8 Stat. 228, 229, Art. 2, para. 2:

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[2] This case on the part of the United States in "national treatment" treaties may or may not be attributable to the almost universal condemnation of the policy of evasion adopted by the United States in interpreting and applying the "most-favored nation clause". See Conroy, *The American Interpretation of the Most Favored Nation Clause*, 12 Cornell 326, 343: "The record of the American State Department in its interpretation of the most favored nation clause and its conduct of the debates over interpretation is nothing to point to with pride, either from the standpoint of legal soundness of the arguments advanced, or from the standpoint of good faith and willingness to fulfill its promises. [p. 350] On the whole it may be said that, though the original introduction of the conditional form was justified, the American interpretation of conditional clauses and instead its interpretation of the clause under any circumstances, has been marked too often by bad faith."

> "No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels, than those payable in the same ports by vessels of the United States; nor in the ports of any of his Brittanick majesty's territories in Europe on the vessels of the United States, than shall be payable in the same ports on British vessels."

Using the same forthright language, and avoiding the refinements incident to domestic theories of permissible classification under the use of the word "discrimination" or "invidious discrimination", the Treaty with the Netherlands August 26, 1852, Article III, 10 Stat. 982, 983 proclaimed February 6, 1853 provided:

> "Neither party shall impose upon the vessels of the other, whether carrying cargoes or arriving in ballast from either of the two countries, or any other country, any duties of tonnage, harbor dues, light-house, salvage, pilotage, quarantine, or port charges of any kind or denomination, which shall not be imposed in like cases on national vessels."

This Treaty also demonstrates that when the parties desire to except particular classes from operation of their agreement they so state. Article IV provides:

> "The present arrangement does not extend to the coasting-trade and fisheries of the two countries respectively, which are exclusively allowed to national vessels: . . ."

Furthermore, the outstanding feature of commercial treaties of the United States since the abandonment of the conditional most-favored nation clause by Secretary Hughes in 1923 has been the extensive application of "national treatment". Wilson, *Postwar Commercial Treaties of the United States*; 43 A. J. I. L. pp. 262,

265. And in these, when intending to reserve rights of classification the United States has been careful to spell out the reserved class. For example, when preserving the right of a State separately to classify its own corporations, as against those of other States and of foreign countries, the United States has included the specific provision: e. g.:

> "The preceding sentence, and all provisions of this Treaty according to corporations and associations of the Italian Republic rights and privileges upon terms no less favorable than those now or hereafter accorded to corporations and associations of the United States of America, shall be construed as according such rights and privileges, in any state, territory or possession of the United States of America, upon terms no less favorable than those upon which such rights and privileges are or may hereafter be accorded therein to corporations and associations created or organized in other states, territories or possessions of the United States of America.

See Treaty of Friendship, Commerce and Navigation with the Italian Republic, February 2, 1948, Article II, para. 3, 63(2) Stat. 2255, 2258, (proclaimed August 5, 1949).

The opinion of the court of appeals has, in effect, rewritten the clear provisions of Article 15 of the Chicago Convention so as to sanction two different and unequal standards of national treatment on a "classification" theory dependent on whether or not an airline signed a twenty year lease agreement in 1945 or early 1946.[3] We have found no other judicial or administra-

[3] The proviso in Article 15 that foreign registered aircraft charges shall not be "higher" than those paid by "national aircraft engaged in similar international services" was modified by

tive decision of the United States sanctioning two unequal standards of national treatment.

Even under domestic law a classification of customers on the basis of preferred treatment for long term contractors has no basis in law. In the case of *Postal Telegraph Cable Co. v. Associated Press*, 228 N.Y. 370, 127 N.E. 256 (1920), Judge Cardozo wrote:

> But classes are not "just and reasonable" when the only principle of classification is one of order in time, with a resulting division between old customers and new. Favoritism would be unchecked if such classification were accepted. No one would assert *that a contract for a term of years would permit a carrier to discriminate in favor of old customers to the prejudice of new*. . . . (Emphasis supplied)

The preferred Big Four airlines leased properties *for their own exclusive use for 20 years.*[1] The so-called "underwriting" of deficits of the airport was a commitment to pay no more than any other airline including petitioners would have had to pay. (Petition, pp. 38-42). The sole justification for denying equal airport charges to petitioners was the fact that they were never given the opportunity to sign similar long term lease contracts for similar consideration or *any consideration!* Respondent sharpens the issue by stating that it was

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the court of appeals. But this Court has said in *The Amiable Isabella*, 6 Wheat. 1, 72: "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, *upon any notion of equity or general convenience, or substantial justice.*" (Emphasis supplied)

[1] Suppose the leases had been for 99 years. Under the court of appeals opinion Article 15 of the treaty would then not be effective for 99 years. This conflicts with the view held by the State Department (Pet. App. 41a).

irrelevant that petitioners were not given such opportunity. (Br. Opp. p. 12)

II. THE CASE IS IMPORTANT TO FIVE SOVEREIGN NATIONS

Since the filing of the petition for writ of certiorari four sovereign nations (The Republics of Ecuador, Peru, Guatemala and Honduras) have requested that the Supreme Court review this case. A fifth nation, the Republic of Mexico, has protested the charges assessed its national airline which is almost 100% owned by the Republic of Mexico. We know of no case in the annals of the Supreme Court where it failed to review a case deemed by five nations to be important. What is important to those nations must be important to the United States. In fact we know of no case where even one nation requested that this Court grant certiorari and was denied.

Even without support by their governments this Court has denied certiorari in 188 years in only a handful of cases where an alien relying on treaty rights has sought review. *Certainly there is no case in which certiorari has been denied where the lower court did not even mention several treaties under which petitioners relied.*

The multi-lateral Chicago Convention has 98 contracting States. There are 49 similar bilateral agreements of the United States of which seven not considered by the court of appeals are here involved.

The court of appeals has stated the correct rule "that where a treaty admits of two constructions, one restrictive of and the other favorable to rights claimed under it, the latter is to be preferred." (Pet. App. p. 9a). But

after so saying it did not construe the bilateral agreements at all. *A treaty can scarcely be "construed liberally" if it is not construed at all.* The court of appeals merely said that the Panama Agreement "for the purposes of this case, is as effective as the Chicago Convention". (Pet. App. p. 2a). It did not even acknowledge the existence of the Agreements with Brazil, Colombia, Ecuador, Mexico, Peru or Venezuela.

III. ALL UNITED STATES AIRLINES TREATED EQUALLY WITH FOREIGN AIRLINES AT ALL LATIN AMERICAN AIRPORTS

There was stipulated in the record the official publication of the International Civil Aviation Organization[3] which shows that at all Latin American airports used by United States airlines in every instance they are charged equally with petitioners. This is regardless of long term contracts or alleged aid to some airport during its infancy.

IV. RESPONDENT HAS UNJUSTLY ENRICHED ITSELF THROUGH TREATY VIOLATIONS

This is not a case where aliens have seized upon their treaty rights to seek equal charges which are *below cost* merely because some American has somehow achieved an undue preference *below cost*. The amounts of petitioners' payments in excess of Pan American's rates are *surplus* to the respondent Port Authority. That the excess sums paid by petitioners are *overcharges* is borne out by the stipulated facts of record including

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[3] Stip. Ex. 31, Manual of Airport and Air Navigation Facility Tariff—Publication of the International Civil Aviation Organization Doc. 7100—AT/707/7 Seventh Edition—January 1959, and Supplement thereto.

the respondent Port Authority's Bond Prospectus of March 3, 1950.[6]

On February 16, 1960 respondent set aside in an escrow account $41,308,178.00 from *surplus* to cover the potential refunds in these cases. It has also been adding to the escrow fund at the rate of $25,000,000 per month from surplus so that the fund now exceeds 21/4 million dollars.[7] Studies made by respondent's airport engineers indicate that if petitioners' charges were lowered to those of the Big Four (Pan Am and others) the respondent in the future would still be easily able to meet all its obligations.[8]

That the amounts of petitioners' higher charges have in fact become *capital surpluses* of the respondent Port Authority is illustrated by the attached news clipping which appeared since this Court denied certiorari January 11, 1963 (Appendix I). Over two million dollars will now be used for *capital* improvements to "air condition, modernize and refurbish four finger docks" without obligation to repay the money as it had with Eastern Air Lines.

[6] Stip. Ex. 18, page 24.

[7] Idem. In addition it is notable that the total "earned surplus" of the respondent Port Authority as of September 30, 1959 (from latest balance sheet of record) was $17,472,140.93. Stip. Ex. 18, page 34.

[8] Ibid. pages 41, 60-61, 11.

V. FIVE OF THE FOREIGN AIRLINE PETITIONERS COMPETE ONLY WITH PAN AMERICAN—VIZ. THEY ARE ENGAGED IN "SIMILIAR INTERNATIONAL SERVICES" ONLY TO THOSE OF PAN AMERICAN AT MIAMI INTERNATIONAL AIRPORT

One of the difficulties of a consolidated case of this kind with 10 plaintiffs having generally similar rights is that the mass effect tends to obfuscate the claims of some plaintiffs which may be clearly stronger than others.

That is, whatever merit there may be to the theory of the court of appeals to the effect that foreign airlines are only entitled to equality with the *highest* U. S. airline charges for those engaged in "similar international air services", the theory is obviously inapplicable to the *five* petitioning airlines of Mexico, Venezuela, Guatemala, Honduras and Nicaragua. Braniff International Airways does *not engage* in "similar international air services" to those of these five petitioners.

(a) The Venezuelan Airline

Let us take the example of the Venezuelan airline petitioner, Rutas Aereos Nacionales, S.A. (RANSA), a cargo airline, which began service in 1952. It relies in part upon the U.S.-Venezuelan bilateral Air Transport Services Agreement[9] which was never mentioned by the court of appeals. RANSA's rental payments to the Port Authority are higher than any of the original lease-contractors except Pan American (Petition, p. 14). Pursuant to the bilateral agreement both U.S. and Venezuelan airlines operate between Miami, Florida and Caracas, Venezuela. The *only* U. S. airline designated by the United States Civil Aeronautics

[9] 4 U.S.T. & O.I.A. 1493; TIAS 2813 (effective August 23, 1953).

Board to operate the route is Pan American World Airways (Pan American), and it operates passenger services in addition to 7 round-trip scheduled *all-cargo flights*.[10] The Venezuelan airline petitioner RANSA operates only *all-cargo flights*, operating 6 all-cargo flights per week.[11] Clearly RANSA insofar as cargo is concerned is engaged in "similar international services" to those of Pan American (Art. 4 of the bilateral), similar *only* to Pan American and indeed *identical*, parallel, and competitive cargo services.

Article 4 of the U. S.-Venezuelan bilateral requires equality of airport charges for Venezuelan airlines' aircraft engaged in "similar international services". Pan American's aircraft are the *only* U. S. aircraft in this route.

To the Venezuelan carrier, RANSA, it appears highly irrelevant and impertinent that a small U. S. international *passenger* airline Braniff which began service in 1955, *is not in the U. S.-Venezuelan air route at all* and doesn't fly closer than 700 miles to the boundaries of Venezuela, has had to pay equally high charges at Miami to those paid by RANSA at Miami. Does the Venezuelan airline RANSA have a type of galloping treaty rights, viz. valid from 1952 to 1955 before Braniff began to fly to Peru, invalid since 1955 and revivable if Braniff drops out of international service? Meanwhile Pan American and RANSA are charged equally at Caracas.[12]

Even a most restrictive interpretation of the Chicago Convention and the Venezuelan bilateral would seem to

[10] Stip. Ex. 13 page C-713.

[11] Ibid. page C-728.

[12] Stip. Ex. 31, *supra*.

require equality of airport charges for RANSA and Pan American at Miami.

(b) Three Airlines of Central America

The foreign airline petitioners of Guatemala, Honduras and Nicaragua compete in scheduled *passenger* and *cargo* service *only* with Pan American on routes between their capitals and Miami. At the airports of Guatemala, Honduras and Nicaragua, Pan American is charged *equal* to the three Central American airline petitioners.[13] These three countries have no bilaterals with the United States and rely only on Article 15 of the Chicago Convention which provides that in scheduled services their aircraft pay *no higher* than those of United States national aircraft engaged in "similar international services". Pan American's aircraft are the *only* U. S. aircraft so engaged. The services are "similar"—parallel and practically identical services to those of Pan American. Yet they are charged 18 times that of Pan American. It seems indeed irrelevant to the treaty claims of these three foreign airlines that Braniff who doesn't fly within 1000 miles of their shores happens to pay the same as they do in Miami.

(c) The Mexican Airline

All United States airlines flying into Mexico are charged equal airport charges to those of Mexican airlines.[14] This is in accord with Article 15 of the Chicago Convention and Article VII of the United States-Mexico bilateral Air Transport Services Agreement not mentioned by the court of appeals. The bilateral

[13] Stip. Ex. 31, *supra*.

[14] Ibid.

spells out the U. S. and Mexican airline routes. It provides with great specificity as to the regulation of traffic capacities, and even the fares to the public are regulated (Art. XIa). The objectives are "fair and equal opportunity for the airlines of each Party" (Art. VIII).

But despite this Agreement, the Mexican airline petitioner Guest pays 18 times the charges of Pan American at Miami International Airport.

VI. AIRLINES ARE IMPORTANT TO NATIONAL PRIDE FOR LATIN AMERICAN NATIONS

To most Americans an international airline is just another business. Only Americans who have spent a great deal of time in Latin America realize, that a Latin American airliner carrying the national flag abroad is a matter of enormous prestige as well as national pride in these countries. The sight of a Peruvian airliner arriving from an international trip gives to a Peruvian the same pride that the Queen Mary or Queen Elizabeth give to the British, or John Glenn to the Americans.

For this and other reasons the Latin American governments therefore have a great awareness of their own airlines and how they fare abroad. They cannot understand the decision of a "North American" court which interprets a treaty for equality, as sanctioning airport charges on their airlines which for 20 years are 18 times higher than those paid by the great Pan American World Airways of "North America".

It is not surprising that five sovereign Latin American nations filed diplomatic notes with the State Department which were transmitted to this Court expressing great interest and concern as to this case.

VII. ALLIANCE FOR PROGRESS PROGRAM IS RETARDED AND FRUSTRATED BY DECISIONS SUCH AS THAT OF THE COURT OF APPEALS

Many of the good works of the United States are retarded and frustrated by unfair and unjust actions of various United States government administrative decisions and policies from time to time. Countries who have struggled to meet their treaty obligations are amazed that the United States, through a tortured interpretation finds a way out of its treaty obligations. Many Americans frequently express surprise and amazement at the undercurrent of feelings against the United States found so often through Latin America.

The answer lies in the type of thing, which the court of appeals has done here, and which happens frequently in administrative determinations which are either not subject to appeal to the courts or would be unpracticable to litigate because of the expense. Moreover, many times the Latin American nations hesitate to protest a treaty violation for fear of jeopardizing a U. S. loan or aid program. In other words they often feel that they have been "bought out" of their treaty rights in exchange for U. S. aid programs.

VIII. MIAMI INTERNATIONAL AIRPORT RATE STRUCTURE IS A RECURRING TREATY PROBLEM

(a) Similar British and Dutch Airline Cases Pending

There are now pending in the United States District Court similar cases of foreign airlines seeking equality of airport charges at Miami, which operate between their national territories and Miami. British Overseas Airways Corporation, British West Indian Airways and Bahamas Airways Limited, all owned by the United Kingdom, have had pending in the United States Dis-

trict Court for the Southern District of Florida for 18 months a complaint seeking similar relief at Miami to that sought by the petitioners.[16]

The Dutch airline Koninklijke Luchtvaart Maatschappij, N.V. (commonly known as K.L.M. Royal Dutch Airlines) also has had pending in the same District Court a similar complaint.[16] Both the British and Dutch airlines rely on bilateral agreements with the United States which provide for equality of airport charges in almost the identical language to the bilaterals in the case at bar.[17] LAN-Chile, the Chilean airline owned by the Republic of Chile, competes between Santiago, Chile and Miami only with Pan American-Grace Airways, the aircraft landings of which were stipulated to be Pan American's at Miami.[18] LAN-Chile relying on a similar bilateral has also filed a similar complaint.[19]

Counsel for the British and Dutch airlines have indicated that those companies will prosecute their cases to this Court regardless of the outcome of the case at bar. The British, Canadians and the Americans were the principal draftsmen of the Chicago Convention.

[15] Case No. 11091-M-C-GY U.S. Dist. Ct. So. Dist. Fla.

[16] Case No. 11099-M-C-GY U.S. Dist. Ct. So. Dist. Fla.

[17] United States-United Kingdom, the "Bermuda Agreement" February 11, 1946, 60 Stat. 1499; TIAS 1507, effective February 11, 1946; United States-Kingdom of the Netherlands, April 3, 1957, TIAS 4782, effective April 3, 1957.

[18] Stipulation in open Court (R. 355-356).

[19] Case No. 189-62-M-C-GY U.S. Dist. Ct. So. Dist. Fla.

(b) Others Probable in 1966

Even though equality of airport charges is supposedly to be effected as of January 1, 1966, the concept of a sliding scale of charges based on the volume of landings will no doubt be perpetuated. The existing sliding scale utilized, decline according to volume at a ratio of 8 to 1.[20] The result is that a small foreign airline even on the same scale as Pan American in 1966 would pay an average of about 90% more per landing than a high volume operator such as Pan American. This was a matter of our cross-appeal to the court of appeals. The court of appeals did not consider it because it ruled completely against petitioners. Respondent's Brief in Opposition (p. 10) points up the difference in charges which occur to a considerable part because of the enormous discounts for volume allowed by the Port Authority's sliding scale of charges. Obviously discounts of this enormity are not based on a cost differential. If a charge scale graduated in a ratio of 8 for the smallest volume to 1 for the largest volume is vindicated, 16 to 1 or 50 to 1 might be expected in the future. Even the present 8 to 1 ratio, if continued in 1966, will undoubtedly be litigated by some of the present petitioners at that time.

The situation presented in case at bar represents a recurring treaty problem of great importance to the international relations of the United States.

[20] Pan American Lease, Art. II Sec. 2—Stip. Ex. 2.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

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February 8, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

/s/ PHILIP SCHLEIT
Counsel for petitioners

APPENDIX 1

The Miami Herald

January 16, 1963

Airlines' Court Plea Rejected

Airport 'Wins' In Fee Dispute

The U.S. Supreme Court has refused to hear a complaint by 10 Latin American airlines that they are entitled to lower landing fees at Miami International Airport.

The decision apparently clears the way for the Port Authority to get badly-needed improvements at the airport under way, Authority Director Alan C. Stewart said.

The 10 airlines complained they have to pay much higher rates than four American carriers — Delta, Eastern, National and Pan American — who get different rates under an earlier, 20-year contract which runs until 1966.

Federal Judge Joseph Lieb ruled in favor of the airlines here in July 1961, and ordered the Dade Port Authority to refund $769,000 to them. The ruling was reversed, however, by the Circuit Court of Appeals in New Orleans last Aug. 31. The Supreme Court's brief order Monday left the Circuit Court of Appeals ruling in effect.

The Latin lines complained they were charged 50 cents a passenger and $2 a ton on cargo which the Big Four domestic carriers did not pay. The cargo charges were lifted in October 1961, after Lieb's decision, but the passenger charge is still in effect.

Stewart said the Port Authority has been putting $75,000 a month into escrow in case the Latin lines won their suit and collected. He said the total amount in escrow is now more than two million dollars.

"Unless the lines win a rehearing," Stewart said, "this means we can turn loose our escrow fund and get back to modernizing the airport.

"The first thing we want to do is air condition, modernize and refurbish four finger docks. Concourse Six was done with money Eastern Air Lines loaned us and Concourse Two is being finished now. With the escrow money, we want to do Concourses One, Three, Four and Five."

"If we need it," the director concluded, "this will also give us some elastic money to float a bond issue. As far as the bonding houses are concerned, the $300,000 we have been putting into escrow means five million dollars in bonding power."

If the case concludes favorably, and the Metro Commission sitting as the Port Authority approves, Stewart said he was hopeful work on the finger docks could get under way in mid-April.